UNITED STATES CIRCUIT COURT OF APPEALS

SEVENTH CIRCUIT

WESTERN CARTRIDGE COMPANY, a Corporation,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD and AMERICAN FEDERATION OF LABOR and its Affiliated Organizations,
Respondents.
No. 8142. Civil.

Consolidated Causes.

WESTERN CARTRIDGE EMPLOYEES' INDEPENDENT UNION, Etc.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD and AMERICAN FEDERATION OF LABOR and its Affiliated Organizations,
Respondents.
No. 8155. Civil.

BRIEF OF RESPONDENTS AMERICAN FEDERATION OF LABOR and its Affiliated Organizations.

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BRIEF OF RESPONDENTS AMERICAN FEDERATION OF LABOR and its Affiliated Organizations.

A STATEMENT OF THE FACTS.

These cases are before this Honorable Court on petitions for review of a Decision and Order of the National Labor Relations Board (hereinafter sometimes referred to as the Board) filed by the petitioners Western Cartridge Company (hereinafter sometimes called the Company) and Western Cartridge Employees Independent Union, etc. (hereinafter called the Company union), and on request for

enforcement of the Board's order made by the Board and by the respondent American Federation of Labor and its affiliated organizations (hereinafter referred to as the American Federation of Labor).

A full and detailed statement of the facts and the proceedings before the Board together with appropriate record references are contained in the brief for the National Labor Relations Board. We rely on no facts not set forth therein and any statement concerning the facts of the case which we might make at this point would be but repetitious and a burden upon the Court. We, therefore, refer the Court to the Statement of Facts in the Board's brief and adopt them as our own.

THE CONTESTED ISSUE.

There is but one issue involved in these cases, namely, should the Board's order be enforced. The order embraces three principal matters: (1) The contracts the company required its employees to sign individually; (2) the Western Cartridge Employees' Independent Union found by the Board to have been dominated and interferred with in its formation and (3) the discharge of William Elliott.

PROPOSITIONS OF LAW RELIED ON.

The American Federation of Labor relies in general upon the same propositions of law as are relied upon by the National Labor Relations Board. This brief is devoted to general statements concerning admitted facts and principles of law which are well established and accepted.

Individual contracts which thwart the policy of the National Labor Relations Act are appropriate subjects for affirmative remedial action authorized by Section 10 of the National Labor Relations Act.

National Licorice Co. v. N.L.R.B., 309 U. S. 350, 60 Sup. Ct. 569,

American Manufacturing Co. v. N.L.R.B., 309 U. S. 629,

N.L.R.B. v. Hopwood Retinning Co., 98 F (2) 97, and
N.L.R.B. v. Jahn & Ollier Eng. Co., 123 F (2) 589.

An individual no strike agreement violates the Act.

N.L.R.B. v. Jahn & Ollier Eng. Co., (Supra) and Bear Brand Hosiery Co., 40 N.L.R.B. No. 56.

It is indicative of company domination when a union bargains only on inconsequential matters.

N.L.R.B. v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261.

ARGUMENT.

I.

A. The Interest of the American Federation of Labor in This Cause.

The American Federation of Labor began an organizing campaign among the employees of the Western Cartridge Company in the latter part of 1940 (Supplement to Brief of Western Cartridge Company, page 27. Hereafter we shall refer to the supplement to the Brief of the Western Cartridge Company as Company's supp.), and sometime in the fall of 1941 it filed the charges of unfair labor practices against the Company, resulting in the Board's Decision and Order which are the basis of this case. (Company's Supp. pg. 1.)

As a result of its organizing efforts continuously engaged in since the latter part of 1940, and its campaign against the unfair labor practices of the Company, through the procedures of the National Labor Relations Act, the American Federation of Labor has succeeded in enrolling in its ranks approximately 7,000 of the Company's employees. The Company admits in its brief that thousands have been enrolled (see page 23). The American Federation of Labor

has filed a Petition for Investigation and Certification with the Board and an election is now pending having been ordered within 30 days from January 6, 1943, to determine the choice of bargaining representative of the employees (See National Labor Relations Board Case No. R-4688).

Because of the progress it has made in the organizing of the employees of the Company since the Board intervened to prevent the Company from continuing its discouragement of bona fide organizations and collective bargaining, the American Federation of Labor is vitally interested in this cause and the enforcement of the Board's Order. Its gains can be protected and retained and the employees of the Company can exercise their full rights under the National Labor Relations Act only if the Board's order which is being challenged in this cause is enforced.

B. Statement of the Scope of American Federation of Labor's Argument.

The Board in its brief has gone into a detailed analysis of the evidence of the case which supports its order, has stated and discussed the applicable law, and has fully answered the arguments of the petitioners. We shall not duplicate herein these efforts of the Board but shall confine ourselves to a few general observations concerning matters which involve no controversial facts and only well established and accepted principles of law.

II.

A. The Individual Contracts.

The individual contracts which the employees have been required by subtle means to sign have constituted one of the principal barriers to the organizing of the plant and cannot be continued in effect if the right to true and free collective bargaining is to be enjoyed by the employees. This is obvious from a cursory reading, or, at most, a simple analysis of the contract. Consider for a moment a few of the clauses in Section 3 of the contract (Company's

Supp. page 568). In this section the individual employee agrees "to lend the utmost cooperation to the Company" and "to advance the welfare and protect the interest of the Company." Now clearly a promise to lend the utmost cooperation to the Company deprives the employees of the right to lend cooperation to his union if his union needs the cooperation of its members to obtain some just demand. In the same vein, the welfare of the Company cannot always be advanced if union activities are to be engaged in freely for the welfare of the union is often diametrically opposed to the welfare of the Company. Further, to protect the interest of the Company in many instances would be to destroy the interest of the union.

A simple example is at once apparent. Let us take a hypothetical case of a group of employees in one department who are forced to do dangerous work without proper protection. Their appeals to the Company brings only the "take-it-and-like-it-or-quit" attitude. Could it not readily be held that concerted activity by the other workmen to help their fellow employees obtain relief is not lending the utmost cooperation to the Company and is advancing the welfare and protecting the interest of the particular group of employees in opposition to the welfare and interest of the Company in violation of the contract? Certainly it could, and particularly so in view of the fact that in debating the question of the "proper" interpretation of the contract and in determining whether or not the employee had violated the contract the individual employee's contestant would be his employer.

Other clauses in Section 3 and Section 4 of the contract are equally inimical to the purposes of the National Labor Relations Act. All oppose the fundamental basis of the Act, the elimination of the disadvantageous bargaining position of an individual employee in dealing with his employer through the encouragement of collective action. As clearly stated in Section 1 of the Act—

> "The inequality of bargaining power between employees who do not possess full freedom of association

> or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."

The Act gives employees the right to engage in concerted activities for their mutual welfare and protection. The individual contracts involved in this case isolate the individual employees.

To return to the individual contracts, consider Section 6, the enforcement provision of the contract, cleverly separated from the employee's conduct obligations contained in paragraphs 3 and 4 by the long Section 5 dealing with patents. Under this Section 6 the employee loses all the bonus provided for in the contract if he fails to comply with the covenants contained in Sections 3 and 4 of the contract. So not only are the employees deprived of the right to engage in concerted activities by contract, but a penalty is provided if they dare to do so.

Section 9 of the individual contract (Company's Supp. pg. 571) is the most vicious of all. It reads as follows:

> "9. *That in the event of the non-operation, or the material curtailment of the operations, of the plant of the Company due to fire, flood, strikes,* business depression, changing economic conditions, acts of God, or other causes beyond the control of the Company, *this contract may be terminated by the Company;* Provided, however, that in the event of the termination of this contract by the Company as outlined in this paragraph *for any reason not due to the fault of the Employee,* the bonus and deductions, if any, as provided in Paragraph 6 shall become due and payable within three weeks after such termination."

Of the list of events which, if causing non-operation or material curtailment of the operations of the plant, gives

the employer the right to terminate the contract, only one is directly within the control of the employees. That is a strike. Thus it is then that under this section if the operations of the plant are materially curtailed or stopped entirely by flood, business depression, changing economic conditions, or Act of God, etc., the bonus and the deductions provided for in the contract would become due and payable within three weeks after the Company may have been fit to terminate the contract for the curtailment of operations would not be caused by the fault of the employee. But what if the operations are materially curtailed by an act of the employees striking? A curtailment of operating from that cause would be due to the fault of the employees for that would be the purpose of the strike. In that event if the Company decides to cancel the contract neither the bonus nor the deductions become due and payable within the three week period by the clear and unambiguous language of the proviso clause of Section 9. Apparently they never become payable and the employee who engages in a strike is forced to suffer a material pecuniary loss. Is such an interpretation of the language and intent of Section 9 erroneous? Is it an interpretation that would not be upheld in any court? Those questions are not material. What is the effect on the employee who signs the contract? That is all that is material, and an interpretation that a strike which might curtail the operations of the plant would result in the forfeiture of not only the bonus, but the amount deducted from the employee's wages, is plausible and is the interpretation that would be placed on the language by the employees for they well know that strikes are injurious to the Company and that the Company would take extreme measures to prevent their occurrence. We have no quarrel with agreements not to strike entered into through collective bargaining by the employees, but it violates the Act to require employees individually to forego that right for they do have the right under the Act to engage in concerted activities. As stated in *N.L.R.B.* v. *Jahn Ollier Eng. Co.* 123 F. (2) 589—

"It appeared at the time when the union was attempting to organize and was given publicity at the time when the union was asking for an election. More than that, by it the employees agreed to render uninterrupted service for two years. Breach of this provision was to result in discharge. All this the Board believed justified a finding that the employees had foreclosed themselves of the right to engage in collective bargaining for a period of two years and had agreed not to strike during that period. We think the contract is not to be distinguished in kind and effect, but only in degree, from that in *National Licorice Co.* v. *N.L.R.B.*, 309 U. S. 350, 60 S. Ct. 569, 575, 84 L. Ed. 799, where the court said: 'The contracts * * * were the means adopted to "eliminate the Union as the collective bargaining agency of its employees." We think it plain also that by their terms they imposed legal restraints upon the employees' rights to organize and bargain collectively guaranteed by Sections 7 and 8 of the Act (29 U.S.C.A. §§ 157, 158).' See also *N.L.R.B.* v. *Vincennes Steel Corp.*, 7 Cir., 117 F. 2d 169; *N.L.R.B.* v. *Superior Tanning Co.*, 7 Cir., 117 F. 2d 881."

Bear Brand Hosiery Co., 40 N.L.R.B. No. 56.

These individual contracts are a well thought out and well devised plan to counteract unionization and to restrain employees from employing the benefits provided for them in the National Labor Relations Act.

These individual contracts have been passed upon by a tribunal other than the National Labor Relations Board. The National Defense Mediation Board, predecessor of the National War Labor Board has had occasion to consider these contracts and while we realize that the opinion of that Board concerning these individual contracts is in no way binding on this Court, we feel that the Court might be interested in reading its opinion. It is contained in National Defense Mediation Board case *in the Matter of Western Cartridge Company* and *East Alton Manufacturing Company* and *Chemical Workers' Union Local 22574*, A. F. of L., Case No. 44. It reads as follows:

"28. *Recommendations:* Regardless of whether the individual contracts are or are not valid under the

National Labor Relations Act, the panel regards these contracts in their present form as being inconsistent with a sound collective bargaining relationship between East Alton Manufacturing Company and this Union. We, therefore, recommend that East Alton Manufacturing Company should not assume or offer to its employees any such individual contracts; that Western Cartridge Company or East Alton Manufacturing Company should repay as of August 1, 1941, to each employee in the unit represented by this Union the amount he personally has paid to the Companies under his contract; that Western Cartridge Company and East Alton Manufacturing Company should take no other steps to enforce the individual contracts with respect to employees in the unit represented by this Union; and that the Union execute on behalf of those it represents, whether member or not, a release from liability on these individual contracts. This recommendation does not preclude the East Alton Manufacturing Company from exacting from each employee an appropriate personal pledge confined to the non-disclosure of patents and trade secrets."

There is ample and undisputed authority for the Board's order removing these contracts as a barrier to the employees' enjoyment of their rights and privileges under the National Labor Relations Act. In *National Licorice Co.* v. *N.L.R.B.*, 309 U. S. 350, 60 S. Ct. 569, the Supreme Court held:

> "Since the contracts were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board authorized by Sec. 10 of the Act. *N.L.R.B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261."

See also

American Manufacturing Co. v. *N.L.R.B.*, 309 U. S. 629; *N.L.R.B.* v. *Hopwood Retinning Co.*, 98 F(2) 97; and *N.L.R.B.* v. *Jahn & Ollier Eng. Co.*, (Supra).

B. The Western Cartridge Employees Independent Union.

The fact that the Company Union wanted an agreement providing only for exclusive recognition and a continuation of the individual contracts (See Company's brief. pg. 31) would give rise to a strong presumption of Company domination. This is so for two reasons: (1) No bona fide labor organization would ever agree to the continuation of contracts entered into individually by the employees which completely bar the use of inter-employee cooperation and requires the welfare and the interest of the Company to be advanced without regard for the welfare and interest of the union, and (2) a bona fide labor union would insist on collective bargaining and would not agree to a continuation of individual bargaining.

We have discussed heretofore reason number one, and but a glance at the contract as a whole would be sufficient to convince even a novice in labor relations that in agreeing to a continuation of the individual contracts the Company Union did not engage in collective bargaining but that individual bargaining continued as the practice in this plant as designed by the employer.

By agreeing to Section 1 of the individual contracts, the Company union left to the sole discretion of the Company the tenure of employment of the employees—each employee agreeing individually that his services could be terminated without regard to reason or seniority. Also in Section 1 the Company union left the matter of wages to the discretion of the employer and individual bargaining. The contract provides in Section 1 "The Company agrees to pay the employee the prevailing rate . . . (for) work the employee shall perform . . . " and then " . . . (the) parties hereto recognize the necessity for modifying wage rates . . . ." That can mean only that individual bargaining on the question of wages was to continue. By being a party to the individual contract the employee says to the employer in effect "I recognize that we, you Mr. Employer and myself individually, as parties to the contract, might have to bargain about a change in my wage scale from time to time."

Section 2 forecloses any collective bargaining on the question of overtime pay and Section 7 forecloses bargaining concerning rules, regulations and working conditions, the Company retaining the right to issue instructions when and as it might choose. Thus, with these individual contracts in effect there was little or nothing left for the Company union to bargain about. Obviously, it could function as nothing more than a medium for handling individual grievances, and that was all the Company intended that it should do when the Company encouraged and interferred with its formation. The Company's domination of the policies of the Company union was for the same purpose, namely, the suppression of any real collective bargaining in the plant. This limitation of bargaining to inconsequential items has been held to be indicative of company domination. *N.L.R.B.* v. *Pennsylvania Greyhound Line*, 303 U. S. 261.

The question of whether or not an organization has been company formed and is company dominated is one that turns very closely on the facts. Congress recognized in enacting Section 8(2) of the Act that companies employ most subtle means of encouraging the formation and in dominating nonaffiliated unions. As stated in the report of the Senate (Senate Report No. 573, May 2, 1935, 74th Congress, 1st Session)—

> "It is impossible to catalog all the practices that might constitute interference, which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship. The question is one of fact in each case. And where several of these interferences exist in combination, the employer may be said to dominate the labor organization by overriding the will of the employees."

That the Western Cartridge Company was subtle in forming and dominating the Company union is certain; but that it did encourage its formation and that it did dominate its functioning is clear in the record and the Board's Order requiring the disestablishment of this organization as a bargaining organization should be enforced.

III.

A. The Company's General Attitude Towards Union Labor.

The Company's hostile attitude towards union labor, we believe, can be no better reflected than by its slanderous reference to Francis Bunzy, the President of the American Federation of Labor Federal Labor Union Local 22574 (in its brief, page 39).

Prior to Bunzy's becoming President of Local 22574 and the organization of the employees in the East Alton Manufacturing Company, the Company recognized Bunzy as a good, conscientious, capable worker and encouraged him to go to the Company's training school. (See Brief of Western Cartridge Employees' Union, pg. 12) Since he became a leader in a bona fide labor union he is referred to as "an ex-jailbird" (See Company's Brief, pg. 39).

During a recent hearing in Washington, D. C., before a Panel of the War Labor Board, the Company attempted to smear Bunzy by claiming him to have a jail record. The Chairman of the Panel, Mark Howe, Dean of the Buffalo Law School, ordered all such references physically stricken from the record. Here again we see the Company smearing the leader of the American Federation of Labor Union with which it reluctantly bargains in its East Alton Manufacturing Company. The Company's slanderous remark has no place in its brief—there is nothing in the record concerning Bunzy's credibility, nothing concerning any prison record as a witness—and obviously it amplifies and gives clear evidence of the Company's hostile attitude towards organized labor and its leaders.

A word concerning Bunzy might not be inappropriate at this point. Bunzy, as a young boy of the Civilian Conservation Corps, engaged in the boyish prank of taking one of the blankets which had been furnished by the Government. It so happens that the taking of Government property is a crime and Bunzy was forced to serve a short term for his foolishness. That is all. He has no long prison

record as the Company seeks to make out. He is not an ex-jailbird. He committed no crime of moral turpitude nor one that would shock the conscience. It is disgusting that the Company should continue in its efforts to brand him, plague him and crucify him, but the Company's actions must impress the Court and demonstrate to it the vicious hostility the Company holds for organized labor.

Another demonstration of the Company's hostility to organized labor occurred during a National Mediation Board hearing in 1941 (supra) in which Local 22574 of the American Federation of Labor sought recognition after a Board election. The procedure it had to go through to obtain recognition was in sharp contrast to the recognition readily granted to the Company Union four years previous. The Company's attitude at the hearing was so uncooperative and so independent that only threats of Government seizure of the Company's plant could obtain enforcement of the National Mediation Board's recommendation that the Company recognize the American Federation of Labor Local 22574. While we join with the Company Union's statement that reference to newspaper articles might not be proper, we believe, as it does, that such might be of interest to the Court. (See page 33 in Brief for Western Cartridge Employees' Union.) In that attitude we set forth in a footnote excerpts from an article which appeared in the New York *Times*, June 29, 1941.[1]

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[1] WASHINGTON, June 28.—Officials indicated tonight that the Federal Government might take over the smokeless powder plant of the Western Cartridge Company at East Alton, Ill., if company officials persisted in their refusal to grant exclusive bargaining rights to the local of the Chemical Workers Union, A. F. of L., as recommended by the National Defense Mediation Board.

As the union, which won an NLRB election 377 to 82, called a meeting for Monday night at which a strike may be voted, one official predicted that President Roosevelt would act to take over the plant in advance of an actual production stoppage on Government contracts totaling millions of dollars.

* * * * *

The Mediation Board spent only a few hours discussing the Western Cartridge Company case with company and A. F. of L. representatives before making public its recommendation that the Company drop plans for a court appeal and grant to the union exclusive bargaining rights.

The board panel, headed by Charles E. Wyzanski, Jr., and including Roger D. Lapham for employers, and Edward J. Brown for employees,

This Company, the Western Cartridge Company, was so opposed to organized labor that after literally being forced by all the pressure the Government of the United States could bring to bear to recognize the American Federation of Labor as the bargaining representative of a few of its employees in its Smokeless Powder Division, it went to the trouble and expense of forming a separate corporation of its Smokeless Powder Division for the sole purpose of dealing with organized labor (Company's Supp., page 33). That, may it please the Court, is the type of company which is before you in this cause. It is the employees of that Company that the American Federation of Labor has been seeking to organize that they may enjoy collective bargaining. The Order of the National Labor Relations Board must be enforced against that Company if it is to be made to comply with the National Labor Relations Act.

IV.

A. The Discharge of William Elliott.

That William Elliott was discharged for union activities is amply supported by the evidence, as shown in the brief submitted by the National Labor Relations Board. Nu-

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pointed to Supreme Court decisions holding the NLRB bargaining unit decisions are not subject to review and declared that "there is no substantial probability that an appeal to the courts on this issue would accomplish any purpose except delay."

The panel said that the question of sole bargaining rights was the principal issue, a conclusion which R. H. McRoberts, company attorney, described as "unfair." He told the panel that the company was confident that the union demands upon the company would be so excessive that an agreement would be impossible.

Plant representatives left by airplane late today for St. Louis to confer with directors of the company, but Mediation Board officials, while hopeful that the company would accept the recommendation, expressed doubt of it.

The Mediation Board officials said that company representatives had been asked specifically whether the firm "would execute a contract with the Chemical Workers which had in it only two clauses, the first providing that wages, hours and working conditions shall be the same as those now prevailing under the Company's contract with the independent union and the second providing that the Chemical Workers shall be the exclusive bargaining representative of the employees in the unit certified by the National Labor Relations Board."

The company replied, it was stated, that "it would not agree to the second clause."

merous other employees have likewise been dismissed for the same reason and while the trial examiner so found, the Board did not find sufficient evidence in the record to support the trial examiner's recommendation (Company Supp. 43-45). We, of course, abide by the findings and decision of the Board, but we do want to point out to the Court that it is our opinion that Elliott was not the only one discharged for union activity but the only one whose discharge could actually be proven by substantial evidence to have been caused by union activity. That the Board's Order require his reinstatement is proper, is undisputed and no cases need be cited.

CONCLUSION.

It is respectfully submitted that the Board's Order be enforced in full and the petitioners' petitions denied.

Respectfully submitted,

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Dated this 28th day of January, 1943.